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Federal Communications Commission
Office of the Secretary

December 6, 2010

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: American Public Communications Council, CC Docket 96-45

Dear Ms. Dortch:

The American Public Communications Council ("APCC") hereby submits for filing in the above-referenced matter an original and 10 copies of its Emergency Petition for Interim Relief to Prevent the Disappearance of Payphones. An extra copy of the filing is enclosed to be date-stamped and returned for our files.

If you have any questions regarding the enclosed filing, please do not hesitate to contact the undersigned attorney for APCC.

Sincerely,

Albert Kramer

Albert H. Kramer

AHK/rw

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
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Amendment of the Commission's Rules	)
to Provide Universal Service Lifeline	)
Support for Payphone Line Service	)
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EMERGENCY PETITION FOR INTERIM RELIEF TO PREVENT THE DISAPPEARANCE OF PAYPHONES

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Dated: December 6, 2010

Attorneys for American Public Communications Council

DSMDB-#2860956v8

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EMERGENCY PETITION FOR INTERIM RELIEF TO PREVENT THE DISAPPEARANCE OF PAYPHONES

The American Public Communications Council ("APCC") hereby petitions the Federal Communications Commission to grant emergency relief on an interim basis to halt the precipitous decline in the number of payphones serving the country. Payphones play a critical universal service role by providing access to telephone service for millions of Americans without phones of their own and providing important communications infrastructure in times of disaster or emergencies. APCC requests that the Commission immediately declare Eligible Telecommunications Carriers ("ETCs") providing payphone lines eligible for Lifeline support from the Universal Service Fund for those lines at the same level of dollar support as provided at the combined Tier 1, Tier 2, and Tier 3 Level.

APCC is simultaneously filing a Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service seeking permanent relief along the same lines. The Commission must, however, act on an interim basis to provide immediate relief before the decline in payphones becomes irreversible as payphone deployment ceases to be a viable business. The need has been made all the more pressing by the Commission's recent decisions extending Universal Service support to mobile phones. While otherwise laudable, these actions have had the unintended consequence of hastening the removal of payphones, which are the most efficient means of providing service to many who would otherwise go without service.[1] Absent immediate Commission action to correct any damage it inadvertently has caused, payphones could cease to be a viable business and it would be too late to save the nation's remaining payphones.

I. THE NEED FOR IMMEDIATE EMERGENCY ACTION

In 1996 Congress enacted Section 276 of the Communications Act, which directed the Commission to "ensure the widespread deployment of payphone services to the benefit of the general public."[2] In 1999, there were over 2 million payphones serving the country, and the Commission found that deployment level "most appropriately satisfies Congress's stated goal" of ensuring widespread deployment of payphones,[3] consistent with the "universal service function that payphones provide to those who cannot otherwise afford telephone service."[4] Indeed payphones provide reliable, high quality on demand, always on service to a universal class of users on 24/7/365 basis without the need for advance subscription or equipment purchase or rental, with free 911 and TRS calling.

Since the Commission's finding, however, the number of payphones has plummeted. There are now less than 475,000 payphones left in the entire country. In other words, the number of payphones has fallen to less than a quarter of the amount the Commission found was sufficient to meet its statutory mandate, even as the number of households without any kind of

[1] APCC estimates that as many as 750,000,000—and perhaps as many as one billion—calls are made from payphones every year.

[2] 47 U.S.C. § 276.

[3] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Third Report and Order, 14 FCC Rcd 2545, ¶ 143 (1999).

[4] *Access Charge Reform*, 18 FCC Fcd 12626, ¶ 8 (2003).

phone has remained virtually unchanged.[5] It is thus apparent that the Commission has not been able to fulfill the mandate to ensure widespread deployment.

Moreover recent actions that the Commission has taken are directly contradictory to that mandate in that they can only serve to hasten the removal of the nation's remaining payphones. Beginning in 2008, the Commission has in several cases forborne from statutory requirements and provided substantial Universal Service Fund (USF) subsidies for free mobile phone service.[6] The Commission did so without considering the devastating and unforeseen impact on payphone deployment nationwide that its actions could have.

Since the FCC decided to allow pure reseller mobile carriers to provide USF eligible recipients with free mobile phones, payphones have declined from over 800,000 phones to less than 475,000 nationwide. The decline has been exaggerated in those states in which larger numbers of free mobile phones have been provided through USF support of mobile service. For example, in Florida, where the number of free mobile phones has increased to 400,000 (at a cost in Florida alone of over $4 million per month to the USF program) in just two years, the number of payphones has dropped precipitously from over 34,000 in 2008 to about 16,000 today – a decline of over 50 percent. As more mobile providers become eligible for funding and more states adopt this program, the trend of payphone loss will continue throughout the country. In the last few months alone, the FCC issued orders that clear the way for several additional carriers to provide this service[7] and more and more states are implementing the program. Over half the

[5] In 1997 according to FCC data, 6 million households were without a phone; in 2009 that number is 5,170,000.

[6] *See, e.g. Virgin Mobile USA, L.P.*, 24 FCC Rcd 3381 (2009), *TraceFone Wireless, Inc.*, 23 FCC Rcd 6206 (2008).

[7] *See Conexions Petition for Forbearance*, WC Docket No. 09-197, FCC 10-178 (Oct. 1, 2010); *Telecommunications Carriers Eligible for Universal Service Support,* 25 FCC Rcd 10510

states including Massachusetts, New Jersey, West Virginia, Virginia, Michigan and Georgia have programs in place to provide free mobile phone service through the USF program.

APCC does not take issue with the Commission's decision to subsidize mobile phone service. Having done so, however, the Commission must act immediately to ameliorate the unintended impact that decision has had on payphones and payphone users. Payphones provide an important service to many Americans, and they remain a vital part of our communications system in times of emergency. If the Commission does not act on an emergency basis to halt the disappearance of payphones, there is every reason to believe that they will soon be gone altogether. The result will be a crisis in communications for the millions of Americans, most especially those in lower-income brackets who must rely on payphones for access to critical calling services.

Lifeline recipients are often the same lower income individuals who most rely on and use payphones. Each time a Lifeline eligible person receives a free mobile phone, he or she will use that mobile phone instead of a payphone, at least until the minutes run out. Assuming that the person received 100 free minutes, it is reasonable to think that most if not all of the minutes are being substituted for calls that had been made on a payphone. If a typical payphone needs 100 calls per month to be profitable and survive, for example with 40 repeat customers who each make two calls a month, and 20 one-time customers, it is easy to see how when even one or two of those customers is provided a prepaid phone and stops using the payphone, the payphone can no longer cover its costs, a major part of which is the payphone line service, and will be removed. This negatively impacts the other 58 or 59 payphone users who did not receive a

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(2010); *i-wireless, LLC Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, 25 FCC Rcd 8784 (2010).

mobile phone and may even negatively impact the mobile phone recipients when they run out of minutes if they can't afford to buy additional minutes at the high pricing offered by the carriers.

Moreover, this example illustrates why Lifeline support for payphone line service can be far more efficient than support for mobile phones. A mobile phone is provides service to only one, or at the most two, people. By contrast, Lifeline support for a single or a few payphone lines would allow the deployment of payphones for the 58 or 59 payphone users who are left without service as a result of the subsidy to the mobile provider.[8]

Allowing the deployment of mobile phone service through Lifeline support without looking at this negative impact is contrary to the goals of Universal Service and to the FCC's congressional mandate to ensure widespread deployment of payphones. The Commission needs to take immediate emergency action to arrest the decline of payphones by providing Lifeline support for payphone line service, which can be accomplished at a relatively modest cost to the overall Fund. Simultaneously, the Commission can begin a proceeding to evaluate the best long term approach to this problem, but the bleeding must be stopped immediately before payphones disappear altogether. Because of the high upfront costs that installing a payphone entails, once a payphone is removed, it is highly unlikely that it would ever be economic to reinstall the payphone.

At the moment, there are less than 475,000 payphones still deployed in the country. APCC proposes that payphone line service be eligible for Lifeline support at about $10 per month per line for all publicly available phones for a total cost of about $57 million annually. This is a small amount by comparison to the present (and growing) USF's support for free

[8] Nor should the Commission overlook the unavailability of any service to the members of the household of the Lifeline mobile subscriber when the phone is being carried around by one member of the household who is away, as is generally inevitable The back up for those left behind is the availability of a payphone in case of emergency or other need.

mobile phone service.[9] Continuing to provide subsidized mobile service without providing assistance to payphone service will contribute to the demise of payphones, which remain a critical part of the American communication infrastructure.

With the deployed base of payphones already having fallen by more than three-quarters from the level the Commission found consistent with the Congressional mandate to ensure their "widespread deployment," the consequences of removing even a few of the remaining payphones are greatly magnified. Payphone providers have already been forced to remove multiple payphones from all but the highest volume locations, and to eliminate payphones altogether from many locations. As a result, instead of having ready access to several payphones in their immediate neighborhoods much of the public now must rely on a single, more distant payphone. If those remaining payphones continue to disappear, and users can no longer rely on payphones for their calling needs, it is easy to foresee even in the next year, the collapse of the entire remaining payphone base as providing payphones ceases to be a viable business.

II. <u>THE REQUESTED RELEIF</u>

The Commission can readily implement Lifeline support for payphone line service through existing mechanisms. Attached to this petition are proposed rule changes that would allow Lifeline support for payphone line service. The proposed rule changes are discussed more fully in the companion Petition for Rulemaking being filed at the same time as this Petition. To summarize, the proposed amendments would amend Section 54.400(a) to allow lines actually used for the resale of service to the public to qualify for Lifeline support at a new Tier 5 "Payphone" level, set at the same rate as the combined amounts of the Tier 1, Tier 2, and Tier 3

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[9] In just two years, the cost to the Lifeline program of providing support for mobile ETCs has grown to an annual cost of $385 million dollars. And it is not likely to stop growing. *See* text accompanying nn. 4, 5 above.

amounts under 47 CFR §§54.403(a)(1)-(3).[10] The ETC receiving the support must pass through the entire amount to the PSP subscribing to the payphone line in the form of a reduction in the line rate.

III. COMMISSION AUTHORITY TO ACT ON AN INTERIM BASIS

The Commission has authority to grant the relief requested herein on an interim basis pending the conclusion of the rulemaking that APCC has asked the Commission to initiate. Under Section 553 of the Administrative Procedures Act ("APA"), an agency may act in advance

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[10] The amount of Lifeline support per payphone would normally depend upon the availability of maximum carrier and state contributions under Tier 1 and Tier 2. Butin light of the Section 276 mandate, the Commission can and should dispense with the other requirements contained in 47 CFR §§54.403(a)(1)-(3) except the requirement that the full amount of the Lifeline support must be passed through to the end user. *See* text following this note. As for the requirement that state regulatory authorities approve any reduction in rates given by the ETC as a result of additional support received by the ETC under Tier 1 and/or Tier 2, the approval is, in the case of payphone line rates, superfluous since the reduction would be functionally mandated by Section 276. *See Wisconsin Public Service Commission* 17 FCC Rcd 2051 (2002). Since payphone line rates are set on a non-jurisdictional, total cost basis by federal mandate, any increase in recovery for the federal portion of the total cost recovery would have to be offset by a concurrent reduction in state revenue. In any event, all fifty states have already approved the reductions in line rates required under 47 C.F.R. § 54.403(a)(2). *See, e.g., Rural Broadband Report,* Public Notice, 24 FCC Rcd 12791, n.352 (October 19, 2009); *Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47U.S.C. §214(e)(1)(A) and 47 C.F.R. §54.201(i),* 20 FCC Rcd 15095, n.16 (2005).

As for the state matching requirement of 47 CFR §54.403(a)(3), the Commission should not discriminate between states in carrying out the federal mandate to ensure the availability of payphone service. Moreover, as explained in the accompanying Petition for Rulemaking, one of the reasons Commission intervention is necessary here is because the states have not adequately supported the availability of payphones. It would be circular to say that additional support under Tier 3 will be denied because a state is not providing state USF support since that is one of the factors making the Commission's intervention necessary. Moreover, to the extent states have already adopted Lifeline support, it would presumably apply to support for payphone lines as well. In any event, in those situations where there is no state matching for payphone lines because for some reason the state support does not apply, and if the Commission requires there to be a state match under Tier 3, the effect would be simply to reduce the sum of the Tier 1, Tier 2, and Tier 3, with a commensurate effect on the amount of federal Lifeline payphone line support.

of the notice and comment rulemaking procedures required by the APA when "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

The Commission has in the past acted under the good cause exception to adopt a rule on an interim basis while conducting a notice and comment rulemaking to consider adoption of a permanent rule. For example, the Commission recently adopted rules on an interim basis to counter abuses to the Video Relay Services program in order to preserve the TRS fund. *In the Matter of Structure and Practices of the Video Relay Services Program*, 25 FCC Rcd 6012, ¶ 16 (2010).

"Good cause" is not defined by the APA; therefore "the inquiry into whether good cause [is] properly invoked must proceed on a case-by-case basis." *Alcaraz v. Block,* 746 F.2d 593, 612 (9th Cir. 1984). Generally, however, courts have held that good cause is evident when the delay created by the notice and comment requirements would result in serious damage to important interests. *National Fed'n of Fed. Employees v. Devine,* 671 F.2d 607, 611-612 (D.C. Cir. 1982); *see also Hawaii Helicopter Operators Ass'n v. FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (the good cause exception applies where delay could result in serious harm); *United States Steel Corp. v. United States Envtl. Protection Agency*, 595 F.2d 207, 214 (5th Cir. 1979) (the good cause exception is an important safety valve that should be utilized when delay would do real harm). The good cause exception is particularly applicable here where it is not only payphone providers who will suffer absent immediate action by the Commission but also the millions of Americans who rely on payphones: "when there is a lack of specific and immediate guidance from the agency that would create . . .economic harm, and disruption, not only to the participants of the program . . . but would also extend to consumers in general, the good cause exception is a proper solution to ameliorate this expected harm." *Woods Psychiatric Institute v. U.S.*, 21 Cl. Ct. 324, 333 (1990) (citing *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981)).

The Commission has previously acted on an interim basis in order to prevent the harm that delaying implementation of rules would cause to the payphone industry—and payphone users. In its 2003 order adopting new compensation rules following the D.C. Circuit's remand of its prior rules, the Commission re-adopted the existing rules on an interim basis pending the effectiveness of the new rules.[11] The Commission found that doing so was necessary in order to prevent economic harm to payphone providers and to further its mandate under Section 276.[12]

Similarly, good cause exists here for the adoption of an interim rule by the Commission pending completion of a rulemaking to adopt permanent rules because absent such emergency action, the decline in the number of payphones can become irreversible. If payphones are allowed to disappear, the result will be permanent harm to the millions of Americans who rely on payphones, many of whom have no other way of placing calls.

IV. CONCLSUION

Absent immediate action by the Commission, the existence of many if not most of the nations' remaining 475,000 or fewer payphones is threatened, leaving many of the tens of millions of Americans who depend on them with no access to essential phone services that they

[11] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, ¶ 56 (2003). The effective date of the new rules was delayed both by the need to provide some time for carriers to come into compliance and the need to obtain OMB approval. *Id.* ¶ 55.

[12] *Id.* ¶ 56.

use for everyday calls, free 911 calls and calls to social service agencies. It will also leave many Americans without access to phone services in times of emergency.

Respectfully Submitted,

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